IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1966.

No. 522.

LINUS PAULING,
Petitioner,
vs.
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

1. Respondent concedes that this case is squarely in conflict with **Associated Press v. Walker**, No. 150, 1966 Term, **cert. granted** October 10, 1966. It is submitted that this petition should also be granted, not only to give petitioner his opportunity to be heard, but also, by presenting a different factual context, to bring out other considerations to be balanced, and other ramifications to be considered, and to give this Court an opportunity to delineate the dimensions of "actual malice" more specifically than required in **Times** or **Walker.**

2. Respondent's brief in opposition (p. 11) obfuscates the issue when it argues that petitioner "cannot be permitted on this review to change to another" theory of liability, abandoning the theory petitioner urged at trial. Surely it is not *petitioner* who is changing theories; petitioner earnestly urges that the **Times** rule should not be extended to him, and that he is entitled to a proper trial

on the Missouri law of libel. It is the *court below* which has changed theories, to petitioner's regret.

The ruling below deprives petitioner of his day in court on either theory, by refusing to review the errors of the trial, and by refusing to grant a trial on the new theory. To quote Mr. Justice Brandeis, the ruling thus deprives petitioner of "due process of law—using that term in its primary sense of an opportunity to be heard", **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, 281 U. S. 673, 678 (1930), and of his right to jury trial, guaranteed by the Seventh Amendment.

Footnote 23 in **Times**, carefully read, does not go beyond public officials. The **Garrison** and **Rosenblatt** cases, relied on by the court below, not only fail to extend **Times** to this case, but were decided after the trial in this case. If the new rule advocated by the court below is to govern this case, it is fundamental that petitioner must "have a fair chance" to litigate his claim under that rule. **Schaff v. R. W. Claxton, Inc.**, 144 F. 2d 532, 533 (D. C. Cir. 1944). Even where the appellate interpretation of the law is not a startling innovation, if the case was tried on the wrong theory, the parties are entitled to an "opportunity to try the case . . . with this basic . . . interpretation . . . in mind." **Sutton Drilling Co. v. Universal Ins. Co.**, 335 F. 2d 820, 826 (5th Cir. 1964). The case "must therefore be remanded" for a trial on the new rule, if that rule is to be imposed on petitioner. **Knapp v. Imperial Oil & Gas Prod. Co.**, 130 F. 2d 1, 5 (4th Cir. 1942).

3. The brief in opposition (14-16) erroneously states that the "sole and only evidence . . . relevant" to the issue of malice, as defined by **Times**, is the admission of respondent's publisher that he knew, when he wrote the libelous editorial, that petitioner had not been cited for contempt. Respondent thus ignores not only the undis-

puted evidence that petitioner had not been cited for contempt, but also respondent's failure to suggest any possible excuse for printing the false charge, respondent's continuing campaign of other deliberately false and malicious editorial charges (made in spite of earlier publication of the truth in respondent's news columns), and the series of malicious and abusive epithets (Pet. 6-9, 14-15), all of which are relevant to show respondent's reckless disregard of the truth.

Respondent attempts to escape the impact of the publisher's devastating admission by stating that petitioner's "position and proof below was that respondent had made a mistake," not a deliberate lie, and petitioner should not now be permitted to change that position (15-16). As pointed out above, petitioner must now be given an opportunity to present his evidence in light of the new rule, if that rule is to be imposed upon him. Aside from that, respondent's assertion is simply not true; petitioner explicitly argued at the trial that respondent's publisher knew he was wrong when he wrote the libel, and "was taking a chance" (Tr. 320-21).

Respectfully submitted,

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December 7, 1966.